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Supreme Court of the United States

OCTOBER TERM, 1965.

No. 773

THEMISTOCLES BOUAS,
Respondent,

against

SOCIEDAD MARITIMA SAN NICHOLAS, S.A., and P. D. MARCHESSINI & CO., INC.,
Petitioners.

THEMISTOCLES BOUAS,
Respondent,

against

PANAGHI D. MARCHESSINI, DEMETRI P. MARCHESSINI and ALEXANDER P. MARCHESSINI,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your petitioners, Sociedad Maritima San Nicholas, S. A., P. D. Marchessini & Co., Inc., Panaghi D. Marchessini, Demetri P. Marchessini and Alexander P. Marchessini, pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit for review of the order entered herein on August 30, 1965.

Opinions Below.

The opinions and orders of the United States District Court for the Southern District of New York, in the consolidated cases are unreported and appear at page A-2 and page A-5 of the appendix. The opinion of the Court of Appeals is unreported and appears at page A-1 of the appendix.

Jurisdiction.

The judgment of the Court of Appeals in the consolidated cases was entered on August 30, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented.

(1) Did the Court of Appeals have jurisdiction to hear the appeal from the District Court?

(2) Was the order of the District Court a "final" decision?

(3) Did the District Court apply the proper rule of law in denying defendants leave to include the defense of *res judicata*?

Statutory Provisions.

(1) Recovery for injury to or death of seaman, 46 U. S. C. 688, Vol. 9, p. 7700, (1958 Ed.)

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal

injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Mar. 4, 1915, ch. 153, §20, 38 Stat. 1185; June 5, 1920, ch. 250, §33, 41 Stat. 1007.)"

(2) Final Decisions of District Courts, 28 U. S. C. 1291, Vol. 6, p. 5015

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended October 31, 1951, c. 655, §48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, §12(e), 72 Stat. 348."

Statement of the Case.

Plaintiff, a Greek seaman, at Pireaus, signed articles, pursuant to Greek law, for a voyage on board the *Euryviades*, a Liberian flag vessel. While the vessel was off the coast of Aden, plaintiff sustained injuries. He was put ashore in Aden, where he received medical treatment. He was then repatriated to Greece, where he received further medical treatment. The plaintiff was never in the United States and the vessel never touched the United States.

Subsequently, plaintiff sued in New York Sociedad Maritima San Nicholas, S.A., as owner, and P. D. Marchessini & Co., Inc., as agent, on causes of action under the Jones Act and the general maritime law. Later, he instituted another action against the individual defendants. The two actions were consolidated for purposes of trial.

After suit was instituted in New York, plaintiff went to the vessel's agent in Pireaus and demanded money for his injuries. The agent and plaintiff went to a Greek Court. In open court, plaintiff made his demands under the Greek law. Plaintiff and the vessel's agent then agreed on a compromise settlement. This settlement was made a judgment of the court. Apparently, plaintiff never informed his attorney in New York of the Greek judgment. Neither did the vessel's agent in Pireaus inform defendants' counsel of the Greek judgment until last year.

Prior Proceedings.

1. In the District Court.

When it was finally learned in New York that a judgment had been reached in Greece, defendants presented a certified copy of the judgment of the Greek Court and moved to dismiss on the basis of *res judicata* and accord and satisfaction, or, in the alternative, asked for permission to amend their answers to include the defense of *res judicata*. The District Court refused to recognize the judgment of the Greek Court, denied the motions, and refused leave to reargue or to certify the question to the Court of Appeals.

2. In the Court of Appeals.

Defendants appealed from the District Court. Before the record could be brought up for review, the plaintiff moved to dismiss on the basis that the Court of Appeals

lacked jurisdiction. The motion was granted and the appeal dismissed.

Reasons for Granting the Writ.

(1) To determine whether the right to plead and prove *res judicata* is too important and fundamental to be denied review by the United States Circuit Court of Appeals for the Second Circuit and too independent of the main issue to be denied appellate review until the whole case is adjudicated.

(2) To resolve the conflict in decisions between the Second Circuit in the instant case and the Sixth Circuit.

(3) To determine whether the order of the district court refusing defendants' motion to amend their answers to include the defense of *res judicata* is a final order.

(4) To determine whether the rationale of *Garrett* v. *Moore-McCormack Lines, Inc.*, 317 U. S. 239 (1942), should be applied to foreign judgments.

Arguments for Granting the Writ.

POINT I.

The decision of the Second Circuit is in conflict with a decision of the Sixth Circuit.

In the case at bar, the Court of Appeals dismissed the appeal because of lack of jurisdiction on the basis that the appeal was from a "non-final" order. In a similar case in the Sixth Circuit, an opposite result was reached and was affirmed by this Honorable Court.

In *Gillespie, Admx.* v. *U. S. Steel Corp.*, 321 F. 2d 518 (6th Cir. 1963), *modified* 379 U. S. 148 (1964), it was held that an order dismissing two grounds of a three ground complaint was a final order and thus appealable.

The case involved an action for recovery of damages for the alleged wrongful death of a seaman who fell overboard and drowned, while the vessel was docked in Ohio.

The deceased's mother brought an action on three grounds: "(1) 46 U. S. C. sec. 688 (the Jones Act); (2) the general maritime law (unseaworthiness); and (3) the Ohio Wrongful Death Act." 321 F. 2d 520. On motion of the defendant, the district court dismissed the second and third grounds.

The plaintiff appealed. Defendant moved to dismiss the appeal. The circuit court held that the appeal was, in effect, an appeal from a final order and heard the merits of the appeal. In the case at bar, the Court of Appeals, on plaintiff's motion, dismissed from the bench without even reaching or hearing the merits. In the *Gillespie* case, the Sixth Circuit emphasized compelling reasons why Section 1291 should not be given a technical reading. Here, the reasons are no less compelling.

In the present posture of the cases, neither plaintiff nor defendants are sure what their rights will be in relation to the defense of *res judicata*. From a practical viewpoint, the parties cannot accurately determine what the settlement value of the cases are because the validity of a defense which could dispose of the whole case cannot be determined until an appeal after trial.

Further, even though defendants will not be allowed to plead *res judicata* at the trial, almost certainly the proceedings before the Greek court would come into the case in evidence on the basis that the amount the plaintiff received would go to the issue of the amount of damages to be recovered. The trial judge will have to apply the laws of Greece in acordance with the contract of employment. The trial judge would have to charge the jury that the money received by the plaintiff should be deducted from any judgment the plaintiff might receive but that

the proceedings in Greece could not in any manner be termed a settlement. The jury would be confused by such instructions and the fine technical distinctions between payments and settlements.

If plaintiff receives a judgment, defendants will appeal. At the appeal, among other appealable issues, defendants will again raise the issue of *res judicata* and the effect of the Greek judgment. If the judgment of the trial court is in favor of defendants and plaintiff appeals, defendants will have to raise the same issue of *res judicata* to protect themselves in the event that the Court of Appeals reverses for a new trial. The appellate court, of course, will be in no better position to hear the merits of the defense than it is at the present time. The District Court decided against the defendants on the basis of affidavits submitted by both sides. In any future appellate determination, the court will still have to use the exact same affidavits in deciding whether or not the defendants should be allowed to plead the defense of *res judicata.*

Thus there will be greater stress on the judicial machinery from piecemeal trials and from several appeals than from the issue being decided once and for all at the present time.

POINT II.

What is "final" is often a close question.

The concept of finality has been an extremely troublesome doctrine for the courts. 6 *Moore's Federal Practice* ¶54.04 (2d ed. 1953).

This Court has never construed "final" in its narrow and technical sense but has always given the rule a liberal construction. The federal courts have always made the concept of finality a viable doctrine by looking to the practical effects of their decisions and the particular equities

of the case and not adhering rigidly to any preconceived doctrinaire approach.

As early as 1848, in *Forgay* v. *Conrad,* 47 U. S. (6 How.) 201 (1848), Chief Justice Taney, speaking for a unanimous court, stated:

> "The question upon the motion to dismiss is whether this is a final decree, within the meaning of the acts of Congress. Undoubtedly, it is not final, in the strict, technical sense of the word. But this court has not heretofore understood the words 'final decree' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one consonant with the intent of the legislature." 47 U. S. (6 How.) 203.

Mr. Justice Jackson, in *Dickinson* v. *Petroleum Conversion Corp.,* 338 U. S. 507 (1950), stated that there was no formula to encompass all situations and the competing considerations were the costs of piecemeal review and the danger of injustice through delay.

> "Half a century ago this Court lamented, 'Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees . . . The cases, it must be conceded, are not altogether harmonious.' McGourkey *v.* Toledo & Ohio Cent. R. Co., 146 U. S. 536, 544, 36 L. Ed. 1079, 1083, 13 S. Ct. 170. This lamentation is equally fitting to describe the intervening struggle of the courts; sometimes to devise a formula that will encompass all situations and at other times to take hardship cases out from under the rigidity of previous declarations; sometimes choosing one and sometimes another of the considerations that always compete in the questions of appealability, the most important of which are the inconvenience and costs of piecemeal review on the one

hand and the danger of denying justice by delay on the other." 338 U. S. 511.

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), adopted a different formulation to meet the exigencies of the case. This Court held that appeals will be allowed from orders which finally determine rights separable from the main controversy which are "too important to be denied review and too independent of the cause itself to require that appellate consideration not be deferred until the whole case is adjudicated." 337 U. S. 546.

Cohen was followed in *Swift and Company Packers* v. *Compania Colombiana Del Caribe,* 339 U. S. 684 (1950), which involved an appeal from an order dismissing an attachment. Even though the attachment was at the heart of the case, this Court cited, with approval, the *Cohen* case and allowed the appeal. The attachment could not fairly be called severable and collateral to the main issue as it was at the heart of the proceedings.

The above three cases, all decided within approximately a year of each other, gave new content to the scope of the finality doctrine. Taking the cases together, appeals will now lie from district court orders which are not "final" in accordance with the strict and technical definition of "finality", but which are nevertheless of such intrinsic importance to the determination of the issues involved that to delay their being heard would work considerable injustice and perhaps irreparable harm on the parties involved.

On occasion, this Court has even heard cases from "non-final" orders without articulating its reasons for doing so. *United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1945); *Land* v. *Dollar*, 330 U. S. 731 (1947).

These liberal and meaningful interpretations of the final decision rule have recently been reviewed in *Gillespie*

v. *United States Steel Corp.*, 379 U. S. 148 (1964). The case involved the death of a seaman, allegedly due to drowning while his vessel was docked in Ohio. His mother brought suit alleging causes of action under the Jones Act, the general maritime law, and the Ohio Wrongful Death Act. On motion by defendant, the trial court dismissed the causes of action under the latter two counts. The plaintiff appealed. This Court held that the appeal was proper.

The *Gillespie* case balanced the equities between piecemeal and the inconvenience and costs of delaying an answer that was fundamental to the further conduct of the case. This Court again recognized that it is impossible to formulate a rule that could cover all cases. The instant issue involved in the case at bar is equally fundamental to the further conduct of the case and is severable from the main issues involved.

POINT III.

The defense of *Res Judicata* should be allowed to be pleaded.

In denying leave to defendants to plead the defense of *res judicata*, the District Court applied the rule of *Garrett* v. *Moore McCormack*, 317 U. S. 239 (1942). The *Garrett* case dealt with the effect of a release executed by an American seaman while he was incapacitated. In such instances, this Court held that there was a heavy burden on the party who sought to sustain the release. Different standards should be applied to a judgment freely entered into, in open court in Greece, by a Greek seaman.

The procedure followed by the plaintiff and the agent of the vessel in reducing plaintiff's claim to judgment in Greece was fully in accordance with the laws of the King-

dom of Greece. Therefore, unless there be compelling reasons to the contrary, defendants should be allowed to include the defense of *res judicata.*

It is conceded that the procedure in the Greek courts is different from that prevailing in our courts, but as Judge Cardozo so aptly phrased it in *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 149 (1918):

> "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. . . . The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness." 224 N. Y. 111.

In the case at bar, it is indisputable that the procedure of the Greek court conformed to basic notions of fair play and justice. The plaintiff (in his own native land and in his own native language) appeared personally before a court of competent jurisdiction. (No one doubts or questions a party's inherent right to defend or prosecute his own case *even in the United States.*) He was given an opportunity to plead his cause and he did in fact state his case. He was given all the safeguards provided by the Greek Law—the law of his country and his contract.

For seventy years, the rule in the United States has been to give conclusive effect in our courts to judgments rendered by foreign courts of competent jurisdiction. *Hilton* v. *Guyot,* 159 U. S. 113 (1895). In this era of extensive international trade, there are even stronger reasons to support this salutary rule. Indeed, the leading commentators have stated that greater, not lesser, effect should be given to the general rule. Reese, "The Status in This Country of Judgments Rendered Abroad," 50 Colum. L. Rev. 783 (1950); Smit, "International Res Judicata and

Collateral Estoppel in the United States," 9 U. C. L. A. L. Rev. 44 (1962); PETERSON, "Res Judicata and Foreign Country Judgments," 1963 Ohio SLJ 291 (1963).

Professor Reese, in his article, *op. cit. supra,* stated:

> "When enforcement of a judgment rendered in one American jurisdiction is sought in another, it is the law of the state of rendition which determines whether the judgment can be impeached for fraud. Where the original judgment was rendered in a foreign nation, however, it is believed that the rule is not the same. . . . Case authority is lacking. . . . *Apart from this one difference it appears that the courts make no distinction between local and foreign judgments in regard to the effect of fraud.* Again there is a paucity of authority. But it would appear that a foreign judgment like its American counterpart, can be impeached only for 'extrinsic fraud', fraud which deprives the aggrieved party of an adequate opportunity to present his case to the court—and not for 'intrinsic fraud' which involves matters passed upon by the original court." 50 Colum. L. Rev. 793. Emphasis supplied.

Professor Smit, in his article, *op. cit. supra,* also states that in instances similar to the case at bar, a foreign judgment should be given effect.

> "Although proper evaluation of the decisive element is difficult, the determinative factor would seem to be the relation to the foreign forum—and its general social, political and economic climate—of the party against whom the foreign judgment is invoked. A person who has close ties with the foreign community should normally not be heard to complain of the disadvantages of his membership in it. It is reasonable to have the member carry the burden as well as enjoy the privileges of his membership and to hold him bound by the judicial determination of his own community." 9 U. C. L. A. L. Rev. 67.

Here, Bouas appeared before a Court in Greece. (He had the right to retain counsel and chose to save the expense —a plaintiff has the same rights in our courts.) He heard the attorney for the shipowner deny any liability under Greek law and he was given an opportunity to litigate the matter or compromise. The agreed settlement was more than a release,—it was a compromise freely entered into before and with the approval of a Greek court, upon which compromise the court entered its judgment. It was a judgment on a compromise in open court, which is common in our courts. To now declare it a nullity is to impugn the judicial process and the judiciary of Greece.

The word "impugn" does not carry with it the full significance of declaring the Greek court's judgment a nullity—actually, the full import is this: that the District Court, based upon *no credible* evidence, declared that the judiciary of the plaintiff's own native land has committed an act of extrinsic fraud. It is difficult to believe that the sanctity of a court judgment and the doctrine of comity can be *shattered* without at least a trial or a hearing on the fundamental issue of *res judicata.* It is also difficult to understand how the mere passage of time (labeled "laches" by the plaintiff) can give a claimant the right to two days in court for the same cause of action. The real issue is the existence of a prior judgment of a court of competent jurisdiction on the same cause of action *not* how long it took to discover that prior judgment.

To say or even imply (as did the District Court) that the Greek courts are the partial "tools" of shipowners and that Greek seamen are denied the rights guaranteed to them under Greek law is completely unjustified and certainly not supported by any evidence.

To accept the contention of plaintiff would cause great harm to Greek seamen. No shipowner would dare risk

judgments on open court compromises even involving a court's native subjects. They would be forced to insist that all claims be fully denied and fully litigated, thus promoting needless expensive litigation for already overcrowded courts. What would be the sense of open court judgments on compromises in this court if they were to be regarded as mere payments, to be subject to review in another court in another country?

By applying, as if it were an immutable law, the holding of the *Garrett* case, *supra,* to situations totally alien to its underlying rationale, the District Court has taken a rigid unrealistic position. A judgment reached in open court is certainly entitled to more weight than a release obtained from a drugged seaman. Greek law should be applied where a Greek seaman signs Greek articles agreeing to be governed by Greek law and enters into a judgment in a Greek court. *Laruitzen* v. *Larsen,* 345 U. S. 571 (1953). Surely, the law and court procedure of a friendly nation should be given, at least, prima facie validity in our courts.

Conclusion.

WHEREFORE Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

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APPENDIX.

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirtieth day of August, one thousand nine hundred and sixty-five.

Present:

Hon. J. JOSEPH SMITH,
Circuit Judge.

THEMISTOCLES BOUAS,
Plaintiff-Appellee,

v.

SOCIEDAD MARITIMA SAN NICHOLAS, S.A. and P. D. MARCHESSINI & Co., INC.,
Defendants-Appellants.

THEMISTOCLES BOUAS,
Plaintiff-Appellee,

v.

PANAGHI D. MARCHESSINI, DEMETRI P. MARCHESSINI and ALEXANDER P. MARCHESSINI,
Defendants-Appellants.

A motion having been made herein by counsel for the appellee to dismiss the appeal for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted and the appeal from the United States District Court for the Southern District of New York be and it hereby is dismissed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

Opinion and Order of Honorable Dudly B. Bonsal, District Judge.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

THEMISTOCLES BOUAS, Plaintiff, *against* SOCIEDAD MARITIMA SAN NICHOLAS, S.A. and P. D. MARCHESSINI & Co., INC. Defendants.	60 Civ. 4617
THEMISTOCLES BOUAS, Plaintiff, *against* PANAGHI D. MARCHESSINI, DEMETRI P. MARCHESSINI and ALEXANDER P. MARCHESSINI, Defendants.	63 Civ. 494 Motion #46 3/9/65.

BONSAL, D. J.

This action was instituted by the filing of a complaint on November 23, 1960. The defendants answered on January 9, 1961, and thereafter commenced a history of pretrial litigation out of all proportion to the nature of the claim, and which appears, at least in part, to have been designed to delay and burden the plaintiff. Some of the history is told in Judge Sugarman's opinion of March 7, 1963. On February 20, 1963 a second action was instituted against the defendants as individuals, and the two actions were consolidated on April 6, 1964. The consolidated action is now on the calendar and is due to be reached for trial in the near future.

Opinion and Order of Honorable Dudly B. Bonsal, District Judge.

Having obtained leave from the Part I Judge, the defendants have now moved for summary judgment or, in the alternative, for an order granting them leave to amend their answer to allege *res judicata* and accord and satisfaction as affirmative defenses. Defenants' motions are based on "newly discovered evidence", which is that on April 18, 1961 a hearing was held before a Greek magistrate, at which the plaintiff appeared without an attorney, agreed to settle his claim against the defendants for 19,035 drachmas ($635.40), which was paid to him, and released the defendants.

The report of the April 18, 1961 proceedings before the Greek magistrate shows that plaintiff was not represented by counsel and that the amount of the settlement was ridiculously low. There is little, if any, doubt that plaintiff was unaware of what he was doing. Accordingly, the so-called Greek settlement was not an accord and satisfaction; *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239 (1942); nor is the Court bound by it as *res judicata*. *Perdikouris* v. *Liberian S.S. Olympos* 1960 A.M.C. 1985 (E. D. Va., 1960).

It appears that present counsel for the defendants were substituted in early 1962 and actively participated in many of the pre-trial proceedings above referred to without mentioning to plaintiff's attorneys the so-called Greek settlement. Although defendants' counsel have informed the Court that they did not learn of the Greek proceeding until October 1964, their clients must have known about it, and in the Court's view defendants' attorneys are chargeable with the knowledge of their clients for the purpose of this motion. The defendants, having burdened the plaintiff with pre-trial procedures over the years after the alleged settlement was made without informing plaintiff's attorneys about it, should not now be allowed to deny the plaintiff his day in court* Indeed, the history of the litigation

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* In the event plaintiff recovers a judgment against the defendants, the amount thereof should be reduced by the amount of the payment made to the plaintiff before the Greek magistrate in 1961.

shows conclusively that the defendants have been guilty of laches and that their motions are without merit.

Defendants' motions for summary judgment and for leave to amend their answers are both denied.

It is so ordered.

Dated: New York, N. Y.
April 23, 1965.

DUDLEY B. BONSAL
U. S. D. J.

Memorandum and Opinion of Honorable Dudly B. Bonsal, District Judge.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THEMISTOCLES BOUAS, Plaintiff, *against* SOCIEDAD MARITIMA SAN NICHOLAS, S.A. and P. D. MARCHESSINI & Co., INC., Defendants.	60 Civ. 4617
THEMISTOCLES BOUAS, Plaintiff, *against* PANAGHI D. MARCHESSINI, DEMETRI P. MARCHESSINI and ALEXANDER P. MARCHESSINI, Defendants.	63 Civ. 494

Bonsal, D. J.

MEMORANDUM ON DEFENDANTS' MOTION FOR REARGUMENT.

By Memorandum filed on April 23, 1965, defendants' motion for summary judgment on the grounds of *res judicata* and accord and satisfaction, or, in the alternative, for leave to amend their answer to plead these defenses, was denied.

On May 25, 1965, defendants moved for reargument and for an order certifying the Court's decision on their original motion for appeal pursuant to 28 U. S. C. §1292(b).

It is noted that defendants' notice of motion for reargument filed May 10, 1965 was not filed within the 10-day

period prescribed by Rule 9(m) of the General Rules of this Court. However, the Court has considered the points raised by the defendants, and adheres to its previous decision.

It is true that Rule 15(a) of the Federal Rules of Civil Procedure is construed liberally when justice requires. However, for the reasons stated in the Court's original decision and the absence of "newly discovered evidence", the Court does not believe that the interests of justice would be served by allowing the amendments sought by the defendants.

The complaint was filed on November 23, 1960, and the defendants filed their answer on January 9, 1961, so that the matter then became *sub judice* in this Court. Thereafter, on April 18, 1961, defendants went before a Greek magistrate without disclosing the pendency of the action in this Court. Defendants (1) having failed to inform the Greek court of the action here, and (2) having failed to raise the matter of the so-called Greek settlement for almost four years during which they engaged in lengthy pre-trial proceedings with the plaintiff's attorneys, are not now in a position to raise a question of comity between two courts neither of which was informed as to what was happening in the other.

Defendants' memorandum raises the question of the proper exercise of jurisdiction by this Court because of lack of contacts of the action with the United States. This was not raised in their original motion. Had the issue of the exercise of jurisdiction over plaintiff's personal injury claim been raised early in the litigation, it would not have been an abuse of discretion to dismiss it for lack of contacts with the United States. However, defendants' failure to raise the issue seasonably and waiting instead until plaintiff and his attorneys had expended both time and money in protracted pretrial proceedings leads the Court to the conclusion that even if the issue had been properly

raised now, it would not have been an abuse of discretion to retain jurisdiction. *Conte* v. *Flota Mercante Del Estado*, 277 F. 2d 664 (2d Cir. 1960).

Since the defendants have been guilty of laches, there would appear no useful purpose served in permitting further delay by a certification pursuant to 28 U. S. C. §1292(b).

Defendants' motions to reargue and for certification pursuant to 28 U. S. C. §1292(b) are both denied.

It is ordered.

Dated: New York, N. Y.
July 7, 1965.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 773

THEMISTOCLES BOUAS,

Respondent,

—against—

SOCIEDAD MARITIMA SAN NICHOLAS, S.A., and P. D. MARCHESSINI & CO., INC.,

Petitioners.

THEMISTOCLES BOUAS,

Respondent,

—against—

PANAGHI D. MARCHESSINI, DEMETRI P. MARCHESSINI and ALEXANDER P. MARCHESSINI,

Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Petitioners seek review of an order of the United States Court of Appeals, Second Circuit (A-1),* dismissing for lack of jurisdiction petitioners' appeal from two orders of the United States District Court, Southern District of New York (A-2–A-5).

This is an action by a merchant seaman to recover damages for severe personal injuries suffered by him aboard

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* All references are to Petitioners' Appendix.

the S S EURYVIADIS, among which injuries were fractures of the right ankle (lateral malleolus) and the right heel bone (Os calcis) with gross displacement and involving joint surfaces, fracture of the right wrist involving the lower end of the radius, as well as fractures of two ribs of the left lower chest.

The first District Court order, dated April 23, 1965, denied petitioners' motion for summary judgment and in the alternative for leave to amend petitioners' answers so as to allege affirmative defenses of accord and satisfaction and *res judicata* (A-4). This motion was predicated upon allegedly "newly discovered evidence" (A-3, A-6), which was admittedly in existence, and known by petitioners, for nearly four years (A-3). Same consisted of an alleged settlement made with the injured seaman in Greece and claimed by petitioners to be *res judicata* in the instant action (A-3). There was no judgment or proof of one made by Greek authorities and none is contained in the Record hereon.

This purported settlement was in the sum of $635.40 for all respondent's injuries and the District Court found that the alleged settlement was "ridiculously low" in amount (A-3); that respondent was not represented by counsel in Greece when the "settlement" was made (A-3); that the Greek Court involved in the settlement was not advised of the action *sub judice* which was then already pending in the District Court (A-6).

The District Court further found "There is little, if any, doubt that plaintiff was unaware of what he was doing. Accordingly, the so-called Greek settlement was not an accord and satisfaction . . .; nor is the Court bound by it as *res judicata*" (A-3).

The second order involved hereon was dated July 7, 1965, and denied petitioners' motion for reargument and for certification for interlocutory appeal of the prior order of the District Court [28 U.S.C. 1292 (b)] (A-5). The District Court denied the motion for reargument as well as the request for leave to appeal, (A-7) pointing up the respondents' laches in withholding the facts relative to the purported defense for approximately four years (A-3, A-4, A-6) while, during the same period engaging respondent in a "history of pre-trial litigation out of all proportion to the nature of the claim, and which appears, at least in part, to have been designed to delay and burden the plaintiff" (A-2).

Despite the fact that the certification for interlocutory appeal pursuant to 28 U.S.C. 1292 (b) had been denied, petitioners nevertheless on August 5, 1965 filed a Notice of Appeal to the Court of Appeals from the Orders of April 23, 1965 and July 7, 1965. Same was dismissed on motion of respondent (A-1) and it is this order for which certiorari is now sought by petitioners. It should be noted that petitioners' motion to reargue the original order was belatedly filed (A-5) and that their notice of appeal therefrom was also untimely.

Reasons for Denying the Writ

1. Petitioners' appeal to the Court of Appeals from the order of April 23, 1965 was not timely.

2. The order of the Court of Appeals, Second Circuit, dismissing the petitioners' appeal for lack of jurisdiction was clearly correct since the District Court orders lacked the finality requisite to appellate review required by 28

U.S.C. 1291. Insofar as the District Court order of April 23, 1961 denied the motion for summary judgment, it is not a final order entirely disposing of the District Court action and is therefore not immediately appealable. *Valdosta Livestock Company* v. *Williams,* 316 F. 2d 188 (4th Cir., 1963); *Burleson* v. *Canada,* 285 F. 2d 264, 265 (4th Cir., 1961). *Waller* v. *Professional Insurance Corp.,* 316 F. 2d 729 (C.A. 5th, 1963); *Atlantic Co.* v. *Citizens Ice and Cold Storage Co.,* 178 F. 2d 453 (C.A. 5th, 1949); 28 U.S.C. §1291.

Further, that part of the said District Court order denying petitioners' application for leave to amend is also not a final order appealable as a matter of right. *Hancock Oil Co.* v. *Universal Oil Products Co.,* 120 F. 2d 959 (C.C.A. Cal. 1941), cert. denied 314 U.S. 666, 62 S. Ct. 127, 86 L. Ed. 533; *National Machinery Company* v. *Waterbury Farrel Foundry and Machine Co.,* 290 F. 2d 527, 528 (2nd Cir., 1961); *Balboa Shipping Co.* v. *Standard Fruit & Steamship Co.,* 181 F. 2d 109, 110 (2nd Cir., 1950); 28 U.S.C. § 1291.

Additionally, the District Court order of July 7, denying reargument is likewise interlocutory and not appealable. *Spampinato* v. *M. Berger & Co., Inc. et al.,* 270 F. 2d 46, 48 (2nd Cir., 1961), cert. den. 361 U.S. 944, 80 S. Ct. 409, rehearing den. 361 U.S. 97; 80 S. Ct. 597; *Kleins Outlet Inc., et al.* v. *Lifton,* 181 F. 2d 713, 714 (2nd Cir., 1950), cert. den. 340 U.S. 833, 71 S. Ct. 59.

3. There is no conflict between the circuits.

Petitioners claim a conflict exists in that in a "similar" case, *Gillespie Admx.* v. *U.S. Steel Corporation,* 321 F. 2d 518, the Court of Appeals, Sixth Circuit, allegedly held

the appeal was "in effect from a final order" and heard the appeal whereas in the case *sub judice,* the Court of Appeals for the Second Circuit held the order appealed from was "non final" and dismissed the appeal.

There is no indication by petitioners as to how the cases are "similar". In fact, they are entirely dissimilar.

In the *Gillespie* case, Mary Gillespie, administratrix of the estate of her son, a seaman, brought an action to recover damages for his wrongful death. The administratrix's complaint alleged claims under the Jones Act for her benefit and for the benefit of the decedent's brother and sisters, alleged beneficiaries of decedent. The administratrix also claimed damages under the General Maritime Law and the Ohio Wrongful Death Statute. The District Court dismissed the latter two claims, and also dismissed the claims of the alleged "beneficiaries" under the Jones Act. The administratrix appealed, claiming that the order of dismissal was final, and thus appealable.

The petitioners' case does not involve a wrongful death action nor a dismissal of any of petitioners' claims at the threshold of suit. All that was involved in the District Court was the denials of motions made by petitioners long after the pleadings were closed and the cases placed on the trial calendar. Nor did the District Court orders leave petitioners out of court, as were the "beneficiaries" in the *Gillespie* case, when the District Court dismissed their claims.

Nor is there any conflict in the decisions of the circuits as petitioners claim, since the Court of Appeals in *Gillespie* expressly did not decide whether or not the determination

of the District Court was final, but in fact determined the matter in response to the administratrix's and the beneficiaries' application for extraordinary relief (321 F. 2d at pages 520 and 522).

Ultimately, this court held the *Gillespie* order to be "final", citing important reasons therefor. *Gillespie, Admx. v. U.S. Steel Corporation,* 379 U.S. 148, 13 L. Ed. 2d 199. The Court stated that the District Court order raised questions which were "fundamental to the further conduct of the case" and that a "delay of perhaps a number of years" in determining the rights of the "beneficiaries" might work a great injustice to them and that these considerations outweighed the inconvenience of piecemeal review (379 U.S. 153, 154, 13 L. Ed. 2d at pages 203, 204). As the court's opinion shows, the questions which were fundamental, involved the interpretation of an important Federal law.

As a matter of law, the instant and the *Gillespie* cases are in no ways comparable. *Gillespie* determined an important matter of Federal law. In the instant case, no matter of Federal law not already decided is before the Court. It has long been decided that orders permitting or denying the amendment of a pleading, are not final (see above cases cited), whereas in *Gillespie* it was determined that the order entirely dismissing the claims was final.

With respect to the claim of hardship alleged by petitioners herein at page 6 of their petition, the reasons cited by petitioners are no different than those present upon the resolution of any interlocutory order. Some inconvenience will follow so long as the Federal Courts are committed to a policy against piecemeal appeals.

CONCLUSION

There has been no showing made by petitioners of any error whatever herein nor any basis for an alleged review of the order of the Court of Appeals or of the orders of the District Court. It is respectfully prayed that the petition for a writ of certiorari be denied in all respects.

Respectfully submitted,

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